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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72- .

JOSEPH F. KNOLL, MARK J. KUTE AND ARTHUR C. MEAD, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

PHOENIX STEEL CORPORATION, FIRST PENNSYLVANIA BANKING AND TRUST COMPANY AND UNITED STEEL WORKERS OF AMERICA, ROBERT G. GERSTENEKER, C. H. WEST, JR., H. E. KENTON AND C. L. HAVERSTICK, MEMBERS OF THE RETIREMENT BOARD OF PHOENIX STEEL CORP.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioners, Joseph F. Knoll, Mark J. Kute, and Arthur C. Mead, on behalf of themselves and all others similarly situated, pray that a writ of certiorari be issued to review the judgment entered in this matter on August 25, 1972, by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported as *Knoll v. Phoenix Steel Corp.*, 325 F. Supp. 666 (E. D. Pa. 1971) and is printed in Appendix A to the petition. The opinion of the United States Court of Appeals for the Third Circuit, not yet reported, is printed in Appendix B to this petition.

JURISDICTION.

The judgment for the Court of Appeals of the Third Circuit was entered on August 25, 1972. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Should certain employees of a major steel company, many of whom worked for over 14 years for the company, be denied the right to pension funds, which were part of their wages, because of the untimely closing of their plant and because of language in a pension document requiring 15 years of service for pension eligibility, both of which circumstances the employees were unable to alter?

2. Whether certain other plaintiffs, who qualified for pensions and who had relied upon the promises of a United Steel Workers' Union Official that pension payments would be made in a lump sum fashion rather than incrementally, but who received instead incremental payment of benefits causing them to suffer the most extreme kind of economic and financial detriment, should not be allowed to receive payment of the benefits in lump sum fashion as promised by the Union Official, particularly where those who die before reaching the eligible age receive nothing?

3. Should these plaintiffs be deprived of the right to recover their pension funds when it would be contrary to the sound public policy of the United States?

STATEMENT OF THE CASE.

Plaintiffs are approximately 350 former union employees of Phoenix Steel Corporation (hereinafter called Phoenix) who were deprived of their pension benefits by the untimely closing of Phoenix' Harrisburg Plate Division Plant. Some of these men were cut off completely from their pensions while others were forced to accept the funds in increments too small to seriously mitigate their penurious financial conditions. These men filed suit as a class against Phoenix as their former employer; First Pennsylvania Banking & Trust Company (hereinafter called First Penna. Bank) as trustee of the Pension Plan; four individuals in their capacity as members of the Retirement Board appointed to administer the Plan; and United Steel Workers of America (hereinafter called United Steel Workers) as plaintiffs' union and collective bargaining representative in negotiations under termination of the plan.

Jurisdiction of the various causes of action is based upon § 301 of the National Labor Relations Act (29 U. S. C. §85 et seq.), diversity of citizenship and pendent jurisdiction.

After completion of discovery, all defendants filed motion for summary judgment. On April 13, 1971 District Judge John P. Fullam issued an order in which he (1) concluded that the Court had jurisdiction of the various claims before it; and (2) granted plaintiffs' motions for confirmation and maintenance of the case as a class action, but (3) granted defendants' motions for summary judgment as to all of the plaintiffs' causes of action.

On December 31, 1960, Phoenix permanently closed its plant at Harrisburg and terminated the employment of all plaintiffs as a result. Phoenix had no nearby plant to which to transfer them and most of these plaintiffs lost their means of livelihood. Due to depressed economic conditions in the Harrisburg area, many were unable to find new jobs

and had to draw unemployment compensation for lengthy periods of time. Those plaintiffs who were eventually able to secure new employment did so at lower wages than they had earned while working for Phoenix.

The closing of the plant also terminated the portion of Phoenix' pension plan attributable to Plate Division employees. This brought procedures set forth in § 17 of the Plan as amended (which provided for distribution of funds upon termination) into effect. The Retirement Board was required thereunder to give first priority to employees already retired or qualified to be retired and on pension. Section 17(c) then required the Board to give precedence over the remainder of the fund to employees having 15 or more years of continuous service at the time of termination "in such amount, upon such terms, and under such conditions as the Board shall determine to be equitable". Section 17(d) further provided for the allocations for § 17(c) employees to be accomplished by continuing the fund in Trust or by the purchase of annuities (or by a combination of these methods), with the proviso that upon finding that it is not practicable or desirable under the circumstances to follow either of the specified methods, the Board could make the allocations to such employees by "other" (unspecified methods).

It was the opinion of both the District Court and Court of Appeals that the record in this case presented no factual issues for determination by a jury, and all of plaintiffs' claims were dismissed on defendants' motions for summary judgments.

Without directly addressing the issue of unjust enrichment to the defendant, the Court of Appeals ruled that the Pension Plan constituted a contract which barred recovery by the plaintiffs. Moreover, the Court of Appeals concluded that there was no justiciable factual issue as to interpretation of § 17(d) of the Pension Fund Agreement.

REASONS FOR ALLOWING WRIT.

Certiorari should be granted to review the decision of the United States Court of Appeals for the Third Circuit in the instant case because:

1. The decision of the Court of Appeals upholding the dismissal of the plaintiffs' cause of action against the Phoenix Steel Corporation failed to correctly address the issue of unjust enrichment. The defendant received the benefits of the labors of the plaintiffs over a long period of time without giving in return fair and full compensation for their labors. The manner in which pension plans are designed to work is fully and correctly conceptualized in the case of *Lucas v. Seagrave Corp.*, 277 F. Supp. 338 (D. Minn. 1967) which the Court of Appeals incorrectly interpreted as mitigating against plaintiffs' case.

2. The Court of Appeals improperly upheld the decision of the District Court dismissing plaintiffs' cause of action under § 17(e) of the Pension Agreement. This decision resulted in severe economic hardship for certain plaintiffs. The Courts below should have left it to a jury to determine all the factual issues raised by plaintiffs regarding their claim against Phoenix Steel Corporation and the United Steel Workers. These issues were: (1) whether or not a promise was made to them by the union that they would secure a lump sum payment of the pensions; (2) whether plaintiffs, in fact, relied on these assurances either by making plans dependent on receipt of the money or in failing to make their desires known to the Board directly, either by grievance procedure or otherwise; and (3) whether plaintiffs' reliance thereon was reasonable despite

the request that the Retirement Board in its discretion determine the now "practicable and equitable" method of distributing pension funds on termination of the plan—the Board gave *no* consideration to the plight of the men and their families and, hence, no discretion was exercised by the Board.

A. The Court of Appeals Improperly Upheld the Motion for Summary Judgment Granted to the Plaintiff by the District Court.

1. The Question Presented by This Case Is a Significant One Which Should Be Reviewed by This Court.

The termination of the Pension Plan and closing of the Plate Division Plant at Harrisburg by Phoenix Steel Corporation posed severe economic consequences for a large number of plaintiffs involved in this action. Many of these men worked for this financially troubled company for more than fourteen of the fifteen years required for eligibility for pensions. Termination of operations of the Plate Division Plant meant not only loss of a job but *total* loss of earned pensions.

Thus far, the Courts below have ruled there is *no possibility* that these plaintiffs have a basis for relief of this inequity because the terms of the pension agreement do not specifically provide relief.

The plaintiffs, however, argue that quasi-contractual relief is available to employees who are released before their pension rights vest under the terms of the pension plan. *Lucas v. Seagrave Corp.*, 277 F. Supp. 338 (D. Minn. 1967), involved a number of employees who, like plaintiffs, had been released en masse before their pension rights vested. The court stated:

> "Even if an employer has made no promise to vest pension benefits in employees upon their termination before reaching retirement age, this may not relieve him of an obligation to do so . . . There is a unilateral contract . . . The employer must . . . return benefits earned by the employee as a result of his service . . . id. at 345 (emphasis added)."

In *Lucas*, the discharge of a large number of employees was a contingency not provided for by the pension plan. The court also noted that the defendant had had the full value of the employees' services while working for it and now, it should repay the uncompensated portion of the wages (i.e., the pension benefits earned).

A similar case, *Fredericks v. Georgia-Pacific Corp.*, 331 F. Supp. 430 (E. D. Pa. 1971) involved a former employee of Georgia-Pacific Corporation who was suing for his distributable interest in the company's stock bonus trust, which he had forfeited upon the termination of his employment. The plaintiff alleged that the interest in the trust had served as a large part of his motivation in joining Georgia-Pacific and that he had resigned because of "a series of minor and major humiliations and harassments" from the company. Both parties disagreed as to whether quantum meruit could serve as a basis for recovery on the interest.

The court refused to grant defendant's motion to dismiss because it could not say ". . . that the reversion of benefits would not be inequitable" as a matter of law. The court felt that *Lucas v. Seagrave Corp.*, 277 F. Supp. 338 (D. Minn. 1967), had established the principle that:

> ". . . discharged employees could recover forfeited pension plan rights on the basis of quasi-contract even though they were precluded from recovering under the terms of the plan itself . . . moreover . . . according

> to the *Lucas* court, a quasi-contractual recovery has been held available even though it appears that employees have agreed to assume the risk of contingencies which may render impossible the complete performance of a service contract."

Clearly, deferred compensation in some form is owed by an employer to an employee who does not receive full and fair compensation for the performance of labor at the time of the performance.

Moreover, long settled contractual principles apply to our facts. Thus:

> "Where the defendant fails or refuses to perform his contract and is justified therein by the plaintiff's own breach of duty or non-performance of a condition where the plaintiff has rendered a part performance under the contract that is a net benefit to the defendant, the plaintiff can get judgment . . . for the amount of such benefit in excess of the harm he has caused to the defendant by his own breach, in no case, exceeding a ratable proportion of the agreed compensation, if the plaintiffs' breach or non-performance is not willful and deliberate . . ." Restatement, Contracts § 357 (1932). See Williston Contracts, § 1973 (1938); 6 Corbin, Contracts, § 1369-72 (1962).

In the present case, plaintiffs' inability to perform the conditions of the pension plan (i.e., continued employment until time of a specified age) was not a willful violation of the contract; indeed it was quite involuntary. The employer caused the non-performance by closing the plant and thereby did unilaterally bar these plaintiffs from ever fulfilling the eligibility requirement. Thus, Phoenix cannot argue that it was harmed by non-performance.

2. The Lower Court Erred in Dismissing Plaintiff's Claim Against the United Steel Workers Because the Evidence Showed That Plaintiffs Acted in Substantial Reliance on the Union's Promise That It Would Secure Immediate Lump Sum Payment of Their Pension Benefits and That Thereafter, Substantial Injustice Was Done to Plaintiffs as a Result of the Union's Complete Failure to Make Known to the Retirement Board of the Phoenix Steel Corporation the Plaintiffs' Urgent Needs in This Regard.

Certain plaintiffs have a cause of action against United Steel Workers Union based upon the Union's failure to adequately represent the employees in its negotiations with Phoenix Steel Corporation and its Retirement Board over the termination of the pension plan. As the evidence will show, a representative of the Union promised plaintiffs that it would secure lump sum payments for them; thereafter, plaintiffs relied on this promise being fulfilled and did nothing further to make their position known to the Board. Notwithstanding its assurance, the Union violated its duty to represent plaintiffs by failing to make their wishes known to the Board and Phoenix. Furthermore, the Union's promise and plaintiffs' reliance thereon raise factual issues for a jury to decide as to plaintiffs' right to recover under the doctrine of promissory estoppel. In support of this theory, certain plaintiffs offered affidavits that they made plans in reliance upon the expected immediate receipt of these funds.

Plaintiffs, therefore, are entitled to litigate their right to recover damages from the Union. *New Eureka Amusement Co. v. Rosinsky*, 126 Pa. Super. 444, 191 A. 412 (1937). See *Langer v. Superior Steel Corp.*, 105 Pa. Super. 579, 161 A. 571 (1932).

Finally, no method of distribution of pension funds was considered by the Board other than an incremental one. It is submitted that this was an abuse of the Retirement Board's discretion as it was charged with finding a "practicable and desirable" way of distributing these funds to eligible pensioners, yet it is clear the Board never gave any consideration to what was "practicable and desirable".

The method of distribution chosen by the Retirement Board operates, in fact, like a "last-man club" or "tontine". Those who survive long enough get back what they put into the pension fund. Those who do not survive long enough, i.e., past age 60, get nothing. Such a system is neither fair nor equitable.

3. Deprivation of the Plaintiffs' Right to Recover Would Be Contrary to the Sound Public Policy of the United States.

The Supreme Court should grant this Writ because it would be in accordance with the sound public policy of the United States. The pension agreement involved here is potentially gravely injurious to the welfare of American workers. For many years, the Federal Government has taken an interest in laborers in private industry. This policy is broadly evidenced by the magnitude of the involvement of the Federal Government in matters which affect private industry and the American laborer. Although many statutes have been enacted regarding labor practices, a few prime examples can clearly illustrate this principle.

In 1913, the United States Congress established a Department of Labor charged with fostering, improving, and developing the welfare of the wage earners of the United States. 29 U. S. C. A. §551 (1913). Subsequently, Congress has become increasingly involved in matters which involve American laborers. The recent passage of the Oc-

cupational Safety and Health Act, 29 U. S. C. A. § 651 (1970), provides a striking illustration.

The Act states that it is Congress' purpose to:

> ". . . assure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources . . ."

Private industry, then, can expect penetrating governmental interest in this area.

Moreover, Congress evidences a concern for the American wage earner from a financial as well as a physiological standpoint. The National Labor Relations Act, 29 U. S. C. A. § 151 clearly demonstrates this point. The Congress states therein that it finds:

> "The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce."

In the instant case, the denial of this Writ would have a harsh result. It would cause hundreds of men to be deprived of their wages despite their having enriched the

Phoenix Steel Corporation by their productivity; and it would cause many other men great hardship because they would receive their pensions in increments too small to mitigate their penurious conditions.

CONCLUSION.

For the foregoing reasons, plaintiffs on this Appeal pray that this Court grant their Writ of Certiorari. They further ask that the case be remanded to the Court below for determination of the various factual issues at a trial before a jury.

Respectfully submitted,

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APPENDIX A.

District Court Opinion and Order.

JOHN P. FULLAM, *District Judge.* April 13, 1971.

On December 31, 1960, the Plate Division plant of the Phoenix Steel Corporation at Harrisburg, Pennsylvania, ceased operations. Many men lost their jobs and have had difficulty in finding employment, at least at wages comparable to those paid by Phoenix Steel. Pursuant to an agreement originally entered into in 1950 between Phoenix Steel and the United Steelworkers of America, the collective bargaining agent for the Phoenix Steel employees, a pension plan was established. The plan calls for contributions by Phoenix Steel to a fund which is held by the First Pennsylvania Bank as trustee. The plan is administered by the Retirement Board, consisting of three members designated by the company.

Section 17 of the basic plan provides for disposition on termination of the plan. Essentially, it provides that those receiving pensions, and those at the retirement age (65) and not yet receiving benefits, are entitled to priority in payment of retirement benefits. Those with 15 or more years of continuous service, but not age 65 by the time of termination, are credited with all the further balance remaining in the fund "in such amount, upon such terms and under such conditions as the Board shall determine to be equitable." The allocations so provided are to be accomplished through either the continuance of the trust or the purchase of annuity contracts; however, the plan also states that: "[T]he Board upon finding that it is not practicable or desirable under the circumstances to do either of the

foregoing with respect to any person or all of the persons included in the groups listed * * *, may provide for allocation of a part or all of the Fund other than through the above methods * * *."

When the Plate Division plant closed, the plan was deemed terminated. The Retirement Board decided to continue the trust. The Company and the United Steelworkers entered into an agreement on March 5, 1961 to supplement section 17 of the basic agreement. This agreement provides that the Company will make no further contributions to the fund and that no portion of the funds will be returnable to the Company. Also, provision for pension benefits is made for those former employees who had at least 15 years service at the time they reached age 60. The fund is segregated from other funds applicable to employees at other plants, and provides only for those formerly employed at the Plate Division plant. As of December 31, 1960, the book value of the fund amounted to $2,859,641.63. Pensions of $2.30 per month for each year of service were authorized for the former employees who fell within the two classes entitled to first priority. Pensions of $1.53 per month per year of service were initially allocated to those former employees who had at least 15 years of service and who reached the age requirements after termination. This amount had increased to $2.00 per month by 1968.

This suit was brought by several of the former employees of Phoenix Steel who lost their jobs when the Plate Division plant closed. They purport to represent the class of all such former employees who were not receiving retirement benefits on December 31, 1960. They have named the Company and the Retirement Board as defendants and claim that section 17 of the pension plan agreement was violated in that the Board should not have continued the trust, but should have paid out the fund in lump sums to the former employees, based on their respective shares in the

fund. They request equitable relief mandating that form of termination of the trust. Jurisdiction is based on the Labor Management Relations Act, §301(a) (29 U. S. C. §185(a)). Plaintiffs also seek the same relief on a *quantum meruit* theory, as to which jurisdiction is asserted under 28 U. S. C. §1332 (diversity of citizenship) and the theory of pendent jurisdiction.

A claim is asserted against the United Steelworkers of America for the sums that would have been paid out of the fund had the trust principal been paid out as lump sums; the bases for this claim are promissory estoppel and, apparently, breach of the duty of fair representation. Jurisdiction is asserted under the Labor Management Relations Act §301(a) and pendent jurisdiction.

All defendants have moved for summary judgment. Plaintiffs have moved for a determination of the class.

The class action.

With respect to the crucial liability issues involved in this case, it is clear that all requirements for a class action have been met. The class is numerous, the issues are common, and, in view of the disposition of the fundamental issues, such differences as might give rise to questions about adequacy of representation as among possible sub-classes need not be faced. The class-action motion will be granted.

Claim against the Company and Retirement Board.

The initial claim is based on the theory that the Company and the Retirement Board breached the contract by which the pension plan was established. Section 301(a) of the Labor Management Relations Act (29 U. S. C. §185(a)) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought

> in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Under this statute, this Court has jurisdiction over the breach of contract claim. Smith v. DCA Food Industries, 269 F. Supp. 863 (D. Md. 1967).

When a pension plan terminates, the rights of the employees to share in the fund vest. Hauser v. Farwell, Ozmun, Kirk & Co., 299 F. Supp. 387 (D. Minn. 1969). Frequently, when plants close, employees are discharged but the pension plan continues in effect for the remaining employees. The discharged employees, being unable to meet the eligibility criteria (years of service, continuous employment until retirement), receive no benefits. Courts have uniformly held that such plant closings do not terminate the pension plan and do not cause a vesting of rights. *See* Green v. Copco Steel and Engineering Co., 22 Mich. App. 16, 176 N. W. 2d 690 (1970); Gorr v. Consolidated Foods Corp., 253 Minn. 375, 91 N. W. 2d 772 (1958); Schneider v. McKesson & Robbins, Inc., 254 F. 2d 827 (2nd Cir. 1958); George v. Haber, 343 Mich. 218, 72 N. W. 2d 121 (1955). Such employees have urged that, despite the actual ending of their employment, they remain employees for purposes of qualifying under the terms of the pension plan. This approach has also been unsuccessful. Local Lodge 2040, International Association of Machinists v. Servel, Inc., 268 F. 2d 692 (7th Cir.), cert. den. 361 U. S. 884, 80 S. Ct. 155, 4 L. Ed. 2d 120 (1959). *See generally* M. Bernstein Employee Pension Rights When Plants Shut Down; Problems and Some Proposals, 76 Harv. L. Rev. 952 (1963).

Here, there can be no doubt that the plan has terminated. However, it is also clear that the employees with 15 years of employment are receiving, or have the right to

receive, pensions when they reach age 60 or 65. It should be noted that plaintiffs do not challenge the termination provisions of the agreement (section 17), which exclude employees with less than 15 years of service at the time of termination. Therefore, under any of the theories asserted, these former employees are barred from recovery by the contract itself. The case is not like Hauser v. Farwell, Ozmun, Kirk & Co., *supra*, where, after contributions ceased, the basic plan was amended so as to prefer some employees over others. The court held that the amendment had no effect because the rights of the employees in the pension fund had already vested. The priorities on termination here were established when the basic agreement was entered into.

The foregoing discussion sharpens the issue presented here. Plaintiffs are not complaining that they have been deprived of benefits, but object to the form of the benefits. They contend that the Retirement Board abused the discretion afforded it by section 17, and thereby breached the termination provisions of the contract. The abuse of discretion allegedly occurred because the Board, in light of the hardship suffered by the plaintiffs due to their inability to find comparable work should have found continuation of the trust to be inequitable and not practicable or desirable. They contend that an issue of material fact exists in that the extent of this hardship must be determined at trial.

More specifically, the present issue is not whether the Board should have considered the hardships of the plaintiffs. It apparently did so, to some extent, in lowering the qualifying age to 60. The issue is whether hardship or any other circumstance, other than the lack of sufficient funds to provide meaningful pensions, is a ground for discontinuing the pension trust for those who desire lump-sum payments. The affidavits of Robert G. Gersteneker, Chairman of the Retirement Board, and Hugh Carcella, District

Director of District 7, United Steelworkers of America, make clear that the Board and the Union felt that under the contract the pension trust had to be continued unless the fund was insufficient, and, in their judgment, the fund was sufficient. The Board never exercised any discretion on the issue of providing lump-sum payments on the ground of hardship; it never considered this alternative. If plaintiffs' contention is correct, then the proper remedy would be either to refer the matter back to the Board for consideration in light of this interpretation of the contract, or for this Court to hear the evidence and exercise the function of the Board. It is the latter remedy that plaintiffs desire.

However, neither of these courses of action is appropriate if the Board's interpretation of the contract was correct. And the Board should be allowed some scope of discretion in interpreting the contract. Roark v. Lewis, 130 U. S. App. D. C. 360, 401 F. 2d 425 (1968).

The whole agreement here is, like all pension plans, designed to provide financial security for employees at a time when they are no longer able to work, due to age. Arguably, the money placed in the pension fund should be used to aid employees whenever they are no longer able to work because of circumstances beyond their control, and should be used in the form most helpful to the particular individual. But, when a particular kind of benefit is provided for in a valid agreement, it is not for a court to interpret the agreement to provide another, though similar, benefit. It is quite obvious from a reading of the entire agreement here involved that a pension program was the only benefit intended, and, under section 17, it was intended to continue when contributions terminated, except if pensions became impracticable because they would not fulfill their purpose as *pensions*. Something more specific would have to appear in the sections of the agreement relating to termination, to counteract the plain import of the entire

agreement, before plaintiffs' position would be tenable. Summary judgment in favor of the Company and the Retirement Board members must be granted.

Plaintiffs assert an alternate claim based on a *quantum meruit* theory. Though there is some dispute as to the citizenship of Phoenix Steel Corporation (Pennsylvania or Delaware) for the purpose of determining federal diversity jurisdiction, this claim clearly arises out of the same transactions and occurrences as the breach of contract claim and is pendent to it. The federal claim, though found to be without merit, is sufficient to support consideration of the state claim. *See* United Mine Workers v. Gibbs, 383 U. S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966).

Plaintiffs rely on Lucas v. Seagrave Corporation, 277 F. Supp. 338 (D. Minn. 1967). There employees were let go when their company merged with defendant. Defendant sought to deprive these employees of all pension rights because they could not meet the eligibility requirements (continued employment until retirement). The court held that the employees could assert a right to share in the fund on the ground that the employees had worked partially for the company's contributions to the fund (which were considered the same as wages), and that the company would benefit by using the contributions "earned" by these employees because future contributions to cover the employees who remained would be much less than before. However, nothing in the case indicated that the employees could assert their right to share in the fund in any one form as opposed to another, nor did the case hold that an unchallenged agreement as to distribution, made long before termination, could be upset under this theory. Moreover, the element of enrichment to the company is missing here. This plan is terminated. The company will not benefit by reduced contributions because all contributions have ended. Nor can the company receive any part of the fund. The defendants are entitled to summary judgment as to this claim as well.

Claim against the United Steelworkers of America.

The contentions against the Union basically amount to a claim that the Union breached its duty of fair representation. Specifically, the complaint alleges that the Union participated in the negotiations which resulted in the continuation of the trust and the supplementary agreement thereto when its representation of the employees had terminated (because they were no longer employed). This contention has apparently been abandoned (and well it should, since it has no merit) and replaced with the contention that the Union did not adequately protect the interests of its members in various ways in connection with the negotiations; however, this claim is not specifically pleaded. Primarily, plaintiffs argue that the Union did not properly consider their needs when it failed to advocate the lump-sum payments they now desire. Further, they allege that the Union did not keep them adequately informed of the negotiations on termination of the plan so that they could express their desires to the Board, and, in fact, misinformed them by leading them to believe that lump-sum payments were being contemplated. Also, they now contend that the Union, in 1967, blocked a settlement of this case which would have resulted in the relief plaintiffs desire.

Jurisdiction is asserted under the Labor Management Relations Act § 301(a). At the outset, it is clear that individual employees may bring suit under this section for breach of a contract between employer and Union. Smith v. Evening News Association, 371 U. S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246 (1962). More questionable, as a matter of logic, is whether an employee can sue his collective bargaining representative in the circumstances presented here. This issue seems answered in the affirmative by Humphrey v. Moore, 375 U. S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370 (1964). There two companies were consolidated and the same union

represented employees at both. Some employees had to be released, and the problem arose whether the seniority lists of the two companies should be dovetailed. The union recommended that this occur, and the employer agreed. An employee who was discharged as a result sued the union for breach of its duty of fair representation. The Supreme Court held that the complaint stated a claim against the Union under §301(a). The Court reasoned that if the union did breach its duty, the decision to discharge certain employees was void, and the discharge of plaintiff was a violation of the collective bargaining agreement. More on point is Smith v. DCA Food Industries, Inc., *supra*, where the complaint brought under §301(a) charged that the union and company amended a pension fund agreement after one division of the company closed, resulting in unfair discrimination against a class of employees. The Court held, in part, that "* * * individual employees may bring suit under section 301 against the union which represents them where the action is based upon an alleged violation by the union of its duty of fair representation. Vaca v. Sipes, 386 U. S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967); Humphrey v. Moore, 375 U. S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370 (1964)." 269 F. Supp. at 868. On the basis of these cases, I conclude that this Court has jurisdiction to consider the claims against the Union based on a theory of improper representation.

However, the disposition of the claim against the Company governs the result on this issue. To breach the duty of fair representation, the conduct of the Union must be arbitrary, discriminatory or in bad faith. Vaca v. Sipes, 386 U. S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Ford Motor Co. v.

Huffman, 345 U. S. 330, 338, 73 S. Ct. 681, 686, 97 L. Ed. 1048 (1953) quoted in Humphrey v. Moore, *supra*. Here the Union's conduct in negotiating the terms of the supplemental agreement and other matters with respect to termination of the pension plan was based on its and the Board's interpretation of the contract which, as stated above, is a reasonable one. Summary judgment in favor of the United Steelworkers of America must be granted.

Plaintiffs direct another theory against the Union. They contend that it is bound by promissory estoppel to pay the lump sums that the men could have obtained from the pension fund, because the local union administrator promised the men that they would get such benefits from the Board. The Union flatly denies that any such statement was made. This claim is based on state law, but it arises out of some of the same factual circumstances as the § 301(a) fair representation claim, and is pendent to it. Again, the basic federal claim, though found meritless, supports consideration of the state claim.

Pennsylvania subscribes to § 90 of the Restatement of Contracts. Fedun v. Mike's Cafe, Inc., 204 Pa. Super. 356, 204 A. 2d 776 (1964). It states:

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise."

Since factual issues exist as to whether any promise was made at all or whether plaintiffs were induced to action or forbearance by it, the issue now is whether the alleged promise is one which, as a matter of law, could be relied upon.

The statement allegedly made by the Union official was, according to the affidavits of some of the employees, that the employees "would receive lump sum payouts from the fund and that he would see to it that the Union secured such payouts * * *." The Union itself had no power to determine the use of the pension trust fund. This authority rested solely with the Retirement Board (Section 21). The Union could, of course, negotiate with the Company and Board concerning the fund. The statement made is nothing but a statement of the Union's negotiating position. To rely on such a statement as a promise that the Union would actually produce the benefits is unreasonable, even for an employee not familiar with the precise terms of the agreement. I conclude that there is no genuine issue of material fact, and that the motion for summary judgment must be granted.

APPENDIX B.

Court of Appeals Opinion.

(Filed August 25, 1972)

ROSENN, *Circuit Judge.*

This is an appeal from an order of the District Court for the Eastern District of Pennsylvania, granting the motion of the defendants, appellees herein, for summary judgment. The case arises from the cessation of operations of the Plate Division Plant of the Phoenix Steel Corporation (Phoenix) at Harrisburg, Pennsylvania, on December 31, 1960. Since Phoenix had no nearby plant to which the employees of the Plate Division Plant could transfer, many lost their means of livelihood.

The plaintiffs, appellants herein, were employees of the Plate Division Plant, and members of a pension fund, established in 1950 by an agreement between Phoenix and the United Steelworkers of America (USW) which was the collective bargaining agency for the Plate Division Plant employees. Section 17 of the plan provided for "Disposition of Fund upon Termination." How this section should be interpreted forms the crux of this case on appeal. The district court succinctly summarized the operative provisions of Section 17 as follows:[1]

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1. The complete text of Section 17 is as follows:

"Section 17: *Disposition of Fund upon Termination*

Upon termination of Plan, either as a whole or partially as to a Participating Employee group at one or more of the plants covered by the Plan, the assets then held in the Fund shall be allocated by the [Retirement] Board on the basis of actuarial valuation to or among the several Participating Employee groups at the respective plants. In making such allocation the Board shall be entitled to rely upon certificates, reports and other data furnished by the actuary. In no case shall the funds so allocated with respect to a Participating Employee group

Essentially, it provides that those receiving pensions, and those at the retirement age (65) and not yet re-

1. (Cont'd.)
exceed the sum of the funds held at December 31, 1959 and the contributions made subsequent thereto by the Company with respect to such group, plus annual interest at the earned rate, less the benefits paid hereunder subsequent to December 31, 1959 with respect to such group.

"For each Participating Employee group as to which the Plan is terminated, the assets of the Fund allocated to that group shall be further allocated, to the extent that they shall be sufficient after making provision for expenses, by the Trustee at the direction of the Board in the following order of precedence:

"(a) to assure the continued payment of Pensions to Participating Employees who are retired and are on Pension at the time of termination;

"(b) to provide retirement benefits to Participating Employees who are 65 years of age or older, and to employees less than 65 years of age who are Permanently Incapacitated, but who are not on Pensions at the time of such termination, at the time their employment with the Company is terminated, except that service after such termination shall not be deemed Credited Service in computing the amount of Pensions;

"(c) to credit all Participating Employees having fifteen more years of continuous service at the time of such termination, with any and all of the further balance remaining in the fund in such amount, upon such terms and under such conditions as the Board shall determine to be equitable;

"(d) the allocations provided above may be accomplished through either (i) continuance of the Trust or a new Trust, or (ii) purchase of insurance annuity contracts or any combination thereof in the discretion of the Board; provided, however, that the Board upon finding that it is not practicable or desirable under the circumstances to do either of the foregoing with respect to any person or all of the persons included in the groups listed above, may provide for allocation of part or all of the Fund other than through the above methods; provided, further, that no change shall be effected in the order of precedence and basis for allocation above established, nor shall any portion of the Fund be returnable to the Company.

"Decisions of the Board with respect to the allocation of the Fund upon termination of the Plan shall, in all respects, be conclusive and binding on the parties hereto, and Trustees, the Participating Employees (including retired employees on Pension) and their respective beneficiaries, heirs, successors and assigns."

ceiving benefits, are entitled to priority in payment of retirement benefits. Those with 15 or more years of continuous service, but not age 65 by the time of termination, are credited with all the further balance remaining in the fund 'in such amount, upon such terms and under such conditions as the Board shall determine to be equitable.' The allocations so provided are to be accomplished through either the continuance of the trust or the purchase of annuity contracts; however, the plan also states that: '[T]he board upon finding that it is not practical or desirable under the circumstances to do either of the foregoing with respect to any person or all of the persons included in the groups listed . . . may provide for allocation of a part or all of the Fund other than through the above methods. . . .

The Fund was deemed "terminated" when the Plate Division Plant closed. Under the provisions of the plan, as outlined above, the Retirement Board,[2] which was charged with administering the plan, elected to continue the Fund. The Retirement Board, again under the provisions outlined above, concluded that only former employees who had at least 15 years service at the time the Plate Division closed, would receive pension benefits when they reached sixty years of age.[3]

Some six years after the Retirement Board had reached its conclusions concerning termination of the plan, suit was brought, on behalf of the former employees, re-

2. The Plan's funds were held by the First Pennsylvania Bank as trustee, but administered by the Retirement Board, which consisted of three members designated by the Company.

3. On March 5, 1971, Phoenix and the USW entered into a Supplemental Agreement which provided that Phoenix would make no further contributions to the Fund, but that no portion of the Fund would be returnable to Phoenix.

questing equitable relief mandating that the payments to be secured from the Fund be in the form of immediate lump sum outlays. The defendants to this action were Phoenix, the First Pennsylvania Trust Company, and the members of the Retirement Board. A second claim, asserted only against the USW, requested payment from the Union of an amount equal to that which would have been immediately forthcoming from the Fund had the Retirement Board chosen to distribute the Fund in the form of immediate lump sum payments, rather than continuing the Fund. On motion of the defendants, USW, Phoenix and Retirement Board, the district court granted summary judgment. From this decision, the employees appeal.

Appellants have raised three arguments. First, appellants call attention to that part of Section 17 which reads:

> . . . provided, however, that the Board, upon finding that it is not practical or desirable under the circumstances to do either of the foregoing . . . may provide for allocation of part or all of the Fund other than through the above methods.

They argue that because of the hardship visited upon the employees by the loss of their jobs, the Retirement Board should have considered other approaches than the ones listed in Section 17. As the district court noted, the position of "the board and Union [was] that under the contract the pension trust had to be continued unless the fund was insufficient and, in their judgment, it was sufficient." The district court concluded that the interpretation of Section 17 given by the Retirement Board and Union was correct. We agree.

The purpose of the Pension Fund, as evinced by the agreement as a whole, was to create pensions. This goal lead to the establishment of the Fund in the first instance. Section 17 goes into considerable detail as to the manner

of preference in which *pensions* are to be distributed in the event of termination of the Fund, and it states that its purpose is "to assure the continued payments of *Pensions* to Participating Employees." (emphasis supplied). Other sections of the Fund agreement also make clear that its sole purpose was the creation of pensions. Section 31, for example, provides that no participating employee has any "right, title, or interest in or to or claim against the Fund, or any part thereof except the right to receive *Pensions* in the amount and subject to the terms, conditions, and requirements in the plan." (emphasis supplied). Consonant with the stated purposes of the Fund, the most reasonable interpretation of that part of Section 17 cited by appellants is that the Retirement Board was only to consider other forms of distribution in the event the Fund was terminated before there were sufficient funds in it to create an adequate pension plan.

Appellants' second contention is that they were entitled to recover on a *quantum meruit* theory of recovery as against Phoenix. The gist of appellants' position is that they relied upon the pension plan as partial consideration for their continued services to the company, yet those employees who had not been employed for 15 years continuous service as of December 31, 1960, will receive nothing from the Fund. The direct answer to this argument is that those appellants who had not had fifteen years continuous employment, and who will not be receiving pensions, are barred from those benefits by the terms of the Pension Fund itself.[4] These terms were known to them when they became employees.

Additionally, appellants' cited authority for their position is not relevant to the instant case. Appellants rely on *Lucas v. Seagrave*, 277 F. Supp. 338 (D. Minn. 1967).

4. See note 1, supra.

There, one company merged with another. Some employees were dismissed as a result of the merger. The pension plan, however, continued in operation. The court held that the dismissed employees were entitled to recover certain money from the pension fund. The critical fact upon which the district court rested its opinion was that the company was using the premiums, contributed by the dismissed employees, to meet *future* obligations owed by the company to the pension fund; yet, simultaneously, the company was denying pension benefits to those employees it had dismissed.[5] In the instant case, however, the pension fund is completely terminated. The company has no further obligations under the terms of the pension fund agreement. It will make no further payments into the plan, and receives no benefits from those who do not share under the termination provisions.

The third and final argument raised here is that the USW should be held accountable because the evidence showed that the appellants acted in reliance on a USW promise that it would secure the pension benefits in the form of immediate lump sum payments. Appellants contend that they were injured by the USW's breach of this promise. This argument is predicated on the allegation that an official of the USW promised the employees that "they would receive immediate lump sum payouts of their pensions and that he would see to it that the Union secured such payments for them."

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5. The substance of the district court's holding in Lucas was that:

> "[W]here the substantial portion of a plan's participants are terminated and the employer benefits by *recapturing his contributions,* as well as by the years of employees' service at compensation less than the actual value of such service, it does not appear extreme or unfair to say that there may be a recovery on a quasi-contractual unjust enrichment theory. (footnote omitted; emphasis supplied).

Id., at 346.

The district court felt that even if such a statement had been made, it would have been unreasonable for the employees to have relied upon it, since the authority to determine the use of the Pension Fund rested solely with the Retirement Board. Thus, the district court concluded that there was "no genuine issue of material fact." Again, we agree. It was not necessary to know the Fund Agreement in any detail to know that the Board was vested with exclusive control of the disposition of the Fund on termination. This was basic and fundamental to the Fund agreement as a whole. As stated in Section 17:

> Decisions of the Board with respect to the allocation of the Fund upon termination of the Plan shall, in all respects be conclusive and binding.

and again in Section 20:

> . . . the Board shall have complete control and authority to determine the rights and benefits in respect of all claims, demands, actions, and other matters arising under the provisions of the Plan.

If, indeed, as appellants suggest, the Fund was an important part of their employment, it cannot reasonably be suggested that they would not have knowledge of the fact the Fund agreement had removed administration of the plan from USW control. Board control, not USW control, was critical to the structure of the plan as a whole. Therefore, assuming that the Union in fact had promised the employees it would secure lump sum payments, reliance upon such a promise would be unreasonable.

For these reasons, the judgment of the district court will be affirmed.